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No. 02-572

In the Supreme Court of the United States

INTEL CORPORATION,

Petitioner,

v.

ADVANCED MICRO DEVICES, INC.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

HUGH F. YOUNG, JR.
Product Liability Advisory Council, Inc.
Suite 510
1850 Centennial Park Dr.
Reston, VA 20191
(703) 264-5300

KENNETH S. GELLER
Counsel of Record
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. FOREIGN PRODUCT LIABILITY ACTIONS ARE INCREASINGLY SIGNIFICANT TO THE OVERSEAS OPERATIONS OF U.S. MANUFACTURERS 5

A. Widespread Changes In Other Countries' Product Liability Laws Have Spurred An Increase In Foreign Product Liability Litigation 5

B. Foreign Procedural Rules, Including Limitations On Discovery, Have Moderated The Effects of The Increasing Stringency Of Foreign Product Liability Rules 8

II. THE OVERLY EXPANSIVE CONSTRUCTION OF SECTION 1782 WILL UNFAIRLY PREJUDICE AMERICAN MANUFACTURERS THAT ARE SUBJECT TO FOREIGN PRODUCT LIABILITY SUITS 12

III. THE NINTH CIRCUIT'S CONSTRUCTION OF SECTION 1782 FLOUTS THE INTENT OF CONGRESS TO PROMOTE EFFICIENT COOPERATION IN INTERNATIONAL LITIGATION 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

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Page(s)

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BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1]

INTEREST OF THE *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 132 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of the law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983, PLAC has filed over 650 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is reproduced in Appendix A.

Because their products are sold throughout the world, many of PLAC's members (or their foreign corporate relatives) are subject to the product liability regimes of other countries. The past decade has seen a significant increase in product liability claims outside the United States, and future increases in foreign claims against American manufacturers seem inevitable. Accordingly, PLAC's members are particu-

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[1] The parties have consented to the filing of this brief; the written consents have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

larly susceptible to developments in the law that affect foreign litigation against U.S. companies.

In the decision below, the Ninth Circuit has held that 28 U.S.C. § 1782 may be employed by a private entity interested in a foreign proceeding to obtain documents that would not have been subject to production under foreign law had they been located within the foreign jurisdiction.[2] Unless the scope of discovery under Section 1782 is limited to comport with the practices of the foreign proceeding to which the application pertains, foreign applicants may be able to obtain expansive discovery from U.S.-based defendants when they are not subject to comparable obligations in the foreign proceeding. The one-sided imposition of U.S.-style discovery obligations will engender unfair results in individual cases and make U.S. companies the preferred targets of future litigation. If that occurs, foreign product liability laws will weigh more heavily on U.S. companies than on their foreign competitors, distorting the application of those laws and im-

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[2] The Ninth Circuit's decision to extend discovery under Section 1782 to a private entity claiming an interest in a non-adjudicatory, preliminary inquiry by a law enforcement agency also is of substantial concern to PLAC's members. Product safety is heavily regulated in many countries, and many foreign administrative agencies accordingly have the power to conduct inquiries into alleged product defects. See Christopher Hodges, *Multi-Party Actions: A European Approach*, 11 DUKE J. COMP. & INT'L L. 321, 342 (2001). Under the Ninth Circuit's approach, a private individual who professes an interest in such a proceeding might well be granted discovery rights under Section 1782, subjecting U.S. companies to pre-litigation "fishing expeditions" by potential foreign claimants. Because PLAC's members are more immediately concerned about the prospect that they will be subject to asymmetrical discovery obligations in foreign judicial proceedings, however, PLAC's amicus brief will focus primarily on the Ninth Circuit's rejection of a "discoverability" requirement.

posing competitive disadvantages on American manufacturers that sell their products around the world.

The background and history of Section 1782 establish that Congress intended to facilitate international litigation and encourage reciprocal action by other countries by making relevant documents available to foreign tribunals when the documents are located in the United States. Congress plainly did not intend to skew foreign lawsuits against U.S. defendants by making U.S. documents available for use in foreign proceedings when they would *not* have been discoverable under foreign law. Because the Ninth Circuit's decision will seriously prejudice all U.S. companies that are subject to suit in foreign countries, PLAC has a substantial interest in urging its reversal.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the Ninth Circuit has held that a private entity claiming an interest in a foreign proceeding may obtain information from a U.S. defendant under Section 1782, even if the information would have been unavailable to the applicant had it been located in the foreign jurisdiction and sought in the foreign proceeding. Pet. App. 8a. If this Court adopts that view, its decision will encourage foreign plaintiffs to assert against U.S. defendants expansive discovery rights that their own legal systems do not provide. Thus, Section 1782 will become a vehicle for imposing asymmetrical discovery obligations on American companies involved in foreign litigation. Although foreign litigants will be able to assert broad rights to discover information located in the United States, U.S. defendants in these cases, restricted in most circumstances to the limited discovery allowed by foreign tribunals, will not be able to obtain similar discovery from their foreign opponents in litigation.

The Ninth Circuit's decision poses a substantial risk to U.S. manufacturers that are subject to the product liability

regimes of other countries. In the past ten years, many foreign countries have adopted new product liability laws based in strict liability, and foreign product liability litigation is on the rise. In comparison with the United States, however, other countries have maintained stringent limitations on pretrial discovery in product liability actions. This restrictive approach to discovery represents the judgment of those foreign legal systems as to the appropriate balance of benefits and burdens, including the extent to which litigation should be encouraged.

If this Court adopts the Ninth Circuit's construction of Section 1782, foreign restrictions on discovery will be easily sidestepped when U.S. manufacturers become defendants in foreign product liability actions. Already, foreign attorneys are becoming increasingly aware that Section 1782 can be used in certain U.S. courts to obtain expansive discovery not afforded by their native courts. If the Ninth Circuit's rejection of a foreign discoverability requirement becomes the law nationwide, American manufacturers defending product liability lawsuits overseas frequently will be subject to discovery obligations not shared by foreign parties to the same cases. The use of Section 1782 to grant one-sided discovery rights will unfairly distort foreign actions against U.S. companies and will make these proceedings substantially more burdensome for defendants, making it easier for plaintiffs to extract settlements even in insubstantial cases. Affording disproportionate access to the files of American manufacturers also will create special incentives to sue them, imposing costs on U.S. companies that are not borne equally by their foreign competitors.

The use of Section 1782 to impose asymmetrical discovery obligations on U.S. companies is inconsistent with the intent of Congress. Congress hoped to make the location of documents largely irrelevant to their discoverability in international litigation. It plainly had no wish to give foreign applicants employing Section 1782 more expansive rights to

discovery of U.S. documents than they would have if the documents were located in their home jurisdictions. Moreover, contrary to the Ninth Circuit's assertions, permitting discovery under Section 1782 without any regard to the discoverability of the material in the foreign forum is inefficient and will not encourage desirable reciprocal action by foreign governments. Finally, allowing applicants to employ Section 1782 to circumvent foreign restrictions on discovery may offend foreign tribunals and would unsettle carefully chosen foreign discovery practices.

ARGUMENT

I. FOREIGN PRODUCT LIABILITY ACTIONS ARE INCREASINGLY SIGNIFICANT TO THE OVERSEAS OPERATIONS OF U.S. MANUFACTURERS

A. Widespread Changes In Other Countries' Product Liability Laws Have Spurred An Increase In Foreign Product Liability Litigation

The United States has long had more intense and significant product liability litigation than other countries. Product liability claims in the U.S. began to skyrocket in the late 1970s and early 1980s. See George L. Priest, *The Current Insurance Crisis And Modern Tort Law*, 96 YALE L.J. 1521, 1533 (1987) (citing Justice Department report describing a 758% increase in federal product liability filings in 1974-1985). While the U.S. was experiencing what many called a product liability "crisis" (see, *e.g.*, Aaron D. Twerski, *A Moderate And Restrained Federal Product Liability Bill: Targeting The Crisis Areas For Resolution*, 18 U. MICH. J.L. REFORM 575 (1985)), product liability claims in other countries remained relatively rare. Accordingly, critics frequently observed that the tort system prevented U.S. manufacturers from competing effectively with foreign producers, which were free to develop new products and bring them to market in their home countries without incurring the costs of defending product liability claims. See Randolph J. Stayin, *The U.S.*

Product Liability System: A Competitive Advantage To Foreign Manufacturers, 14 CAN.-U.S. L.J. 193 (1988); Alfred Cortese, Jr. & Kathleen L. Blaner, *The Anti-Competitive Impact Of U.S. Product Liability Laws: Are Foreign Businesses Beating Us At Our Own Game?*, 9 J. L. & COM. 167 (1989).

Over the last decade, however, product liability litigation has become a more significant facet of business life outside the United States. Throughout Western Europe and elsewhere, foreign nations have been systematizing their rules governing product liability and making it easier for plaintiffs to establish a right to relief. See Marc S. Klein, *Megatrends In International Product Liability Law*, C949 ALI-ABA 113 (1994) (opining that "[s]ome major trading regions seem to be marching in the direction of American-style product liability law and litigation," and providing examples of recent developments in France, England, the Netherlands, Canada, and Japan). Thus, while two decades ago this Court observed that strict products liability remained "primarily an American innovation" (*Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 252 n.18 (1981)), today strict liability has been adopted by many of the U.S.'s major trading partners.

For example, in 1985, the Council of the European Community (EC) adopted a product liability directive requiring all members of the European Union to adopt uniform rules imposing strict liability on manufacturers of defective products. Council Directive 85/374/EEC, art. 4, 1985 O.J. (L 210) 29 (EC Directive). The Commission stated that the Directive had three goals: to harmonize product liability law in order to "equalize competition among the member states," "promote the free movement of goods," and "foster equal protection of the consumer." Kathleen M. Nilles, Note, *Defining The Limits Of Liability: A Legal And Political Analysis Of The European Community Products Liability Directive*, 25 VA. J. INT'L L. 729, 744 (1984-1985). As member countries enacted legislation implementing the directive between 1988 and 1998 (Christopher J. S. Hodges,

Product Liability In Europe: Politics, Reform, And Reality, 27 WM. MITCHELL L. REV. 121, 122 (2000)), commentators predicted that the new regime would produce a dramatic increase in product liability suits in the EU. See, *e.g.*, Ralph Atkins, *Consumers Given Sharper Clause*, FIN. TIMES, Feb. 29, 1988, at 4; Cathleen Ferraro, *Product Liability: Legal Overload Begs For Solution*, INVESTOR'S DAILY, Apr. 11, 1990, at 7.

In fact, in the wake of the Directive, there has been a steady increase in product liability litigation in EU countries. A major study of product liability litigation sponsored by the European Commission was published in March 2003. Lovells, PRODUCT LIABILITY IN THE EUROPEAN UNION: A REPORT FOR THE EUROPEAN COMMISSION (Feb. 2003). The study reported that the majority of the corporations, consumer groups, lawyers and other surveyed concluded that there had been "a noticeable increase in product liability claims in the EU over the past 10 years," while one-quarter of them believed that such suits had increased "a great deal." *Id.* at iv. Study participants also believed that product liability suits in the EU have become more successful and that out-of-court settlements have increased. *Id.*

Other nations also are adopting product liability regimes that are more favorable to consumers and are likely to encourage litigation. In 1994, for example, Japan replaced its old system with a new strict product liability statute that is much more favorable to consumers. Seizobutsu Sekinin Ho [The Product Liability Law], Law No. 85 of 1994. Although Japan has not yet seen an explosion of product liability litigation, the new law has encouraged more out-of-court settlement of product claims, a new emphasis on product warnings, more product recalls, and increased purchase of product liability insurance by Japanese manufacturers. See Jason Cohen, Note: *The Japanese Consumer Liability Law: Sending A Pro-Consumer Tsunami Through Japan's Corporate And Judicial Worlds*, 21 FORDHAM INT'L L.J. 108, 161-

168 (1997); Nancy Young, Comment, *Japan's New Products Liability Law: Increased Protection For Consumers*, 18 LOY. L.A. INT'L & COMP. L. REV. 893, 916-917 (1996). See also, *e.g.*, Gregory W. Fowler, INTERNATIONAL PRODUCT LIABILITY LAW: A WORLDWIDE DESK REFERENCE 154, 164, 308 (2003) (describing recent pro-consumer changes to the product liability laws of China, the Czech Republic, and Hong Kong).

B. Foreign Procedural Rules, Including Limitations On Discovery, Have Moderated The Effects of The Increasing Stringency Of Foreign Product Liability Rules

As the reforms discussed above have expanded manufacturers' potential liability for allegedly defective products, the legal systems within which the new rules operate have discouraged the filing of more dubious claims and have prevented the new rules from imposing excessive burdens on the manufacturing sector. See *Piper Aircraft Co.*, 454 U.S. at 252 n.18 (highlighting differences between U.S. and foreign legal systems); Alfred E. Mottur, Note, *The European Product Liability Directive: A Comparison With U.S. Law, An Analysis Of Its Impact On Trade, And A Recommendation For Reform So As To Accomplish Harmonization And Consumer Protection*, 25 LAW & POL'Y INT'L BUS. 983, 1005-1007 (1994). Of particular relevance here, most other countries have eschewed the expansive discovery practices that have been criticized as imposing excessive costs on defendants even when the plaintiffs' claims are meritless. See *Transcript of the "Alumni" Panel on Discovery Reform*, 39 B.C. L. REV. 809, 825 (1997-1998) (remarks of Mark Gitenstein) (referring to the feeling that, in the U.S., "big business defendants * * * are settling cases because of transaction costs driven by discovery").

With the adoption of the Federal Rules of Civil Procedure, the federal courts — followed by the many state courts

that model their own procedures on the federal rules — instituted a permissive approach to discovery that was virtually unknown elsewhere. See generally Stephen N. Subrin, *Discovery In Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002). The U.S. rules permitting broad discovery frequently have been abused by plaintiffs raising product liability claims. Even in the absence of evidence demonstrating that the product at issue imposed unanticipated risks or even injured the plaintiff, lawyers often are granted broad access to the manufacturer's internal files. They "eagerly seek internal research documents dealing with product development, particularly documents discussing any risk analysis performed on a particular product." Cortese & Blaner, *supra*, at 178. Although these risk evaluations may be "very misleading if taken out of context," they frequently are used "to prove that a product is defective and that the manufacturer knew it." *Id.*

At the very least, the existence of "bad" documents that might be misconstrued by a jury can be used to obtain substantial settlements. Indeed, even the threat of massive discovery can be enough to convince a defendant to settle. And even if a particular plaintiff's claim is denied before trial — for example, because he cannot establish that his injury was caused by the product in question — his lawyers can still exploit their investment of effort in the case by aggressively rounding up other plaintiffs alleging similar claims. Now "educated" by the discovery process regarding the development history of the product at issue, they can represent these new clients at relatively little incremental cost. Once other lawyers follow their lead, hundreds or thousands of similar filings can result, with claimants sometimes extracting substantial settlements before a single case comes to trial.

Other countries have taken a far different and more balanced approach to pretrial discovery that helps to discourage such tactics. In most civil law countries, party-driven pre-trial

discovery is either non-existent or very limited. David Epstein *et al.*, INTERNATIONAL LITIGATION: A GUIDE TO JURISDICTION, PRACTICE, AND STRATEGY § 10-03, at 10-4. (3d ed. 2000); see also, *e.g.*, Craig P. Wagnild, *Civil Law Discovery In Japan: A Comparison Of Japanese And U.S. Methods Of Evidence Collection In Civil Litigation*, 3 ASIAN-PAC. L. & POL'Y J. 1 (2002) ("Japan has no system of pretrial discovery equivalent to that of the United States."). For example, "[t]he basic principle of French civil procedure is that each party freely decides what evidence it chooses to produce." Fowler, *supra*, at 240. Similarly, "German civil procedure does not recognize pretrial discovery or depositions." *Id.* at 262. Italy is the same. *Id.* at 394.

In these countries, document production can be compelled only if the court or the party seeking production "already has positive knowledge of the existence of a specific document." *Id.* at 262. Broad requests for production of all documents relating to particular subject matter are not entertained. As two experts on French discovery practices wrote, "[w]hat the French fear most is not the revelation of damaging material but rather the occurrence of 'fishing expeditions,' that is, any request that is not for a clearly identified document." Vincent Mercier & Drake D. McKenney, *Obtaining Evidence In France For Use In United States Litigation*, 2 TUL. J. INT'L & COMP. L. 91, 118 (1994).

This form of discovery comports with these countries' methods of adjudicating claims. In civil law systems, judges rather than lawyers control the presentation of evidence, and "[t]he civil law judge's role is to decide the case on as limited an issue as necessary." Subrin, *supra*, at 301. Thus,

> [a]fter the pleadings * * *, the judge decides what evidence he or she needs and proceeds to request documents and interrogate witnesses in person. * * * He only explores what he thinks is relevant, and what he originally thought would decide the

> case turns out insufficient to the task, he turns to another avenue.

Id. at 301-302. The uniquely American method of discovery — under which the parties demand from one another all relevant information so that they may ultimately present their cases to the factfinder in an adversarial trial on all issues — plainly is not well-suited to employment in such judge-driven systems.

Common law jurisdictions such as the United Kingdom, Australia, and Canada do employ party-driven pre-trial discovery, but "the scope of United States discovery orders is unparalleled" even in these countries. Epstein, *supra*, § 10-3, at 10-4. Even so, to control what the government perceived to be runaway litigation costs, England recently amended its procedural rules in an effort to streamline, focus, and expedite discovery in civil cases. See Michael E. Stamp, *Are The Woolf Reforms An Antidote For The Cost Disease? The Problem Of The Increasing Cost Of Litigation And English Attempts At A Solution*, 22 U. PA. J. INT'L ECON. L. 349 (2001).

The limitations on discovery that other countries have elected to maintain weed out weak cases and reduce the transaction costs imposed by the cases that are filed. Without the promise of broad discovery, plaintiffs do not bring product liability claims in the hope of finding support by rummaging through the defendant's internal files, but hold their fire unless they believe they can prove by independent evidence that the product is unsafe. See Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1681-1682 (1997-1998) (describing understanding in non-U.S. common law jurisdictions that the plaintiff should have enough independent evidence to prove a *prima facie* case before filing suit, without needing any discovery). Furthermore, while in the U.S. discovery can be so burdensome and expensive that many cases are settled merely to avoid the transac-

tion costs, the more streamlined foreign proceedings may be defended on their merits without waste of resources.

II. THE OVERLY EXPANSIVE CONSTRUCTION OF SECTION 1782 WILL UNFAIRLY PREJUDICE AMERICAN MANUFACTURERS THAT ARE SUBJECT TO FOREIGN PRODUCT LIABILITY SUITS

U.S.-based companies already are disproportionately vulnerable to foreign product liability claims because the formidable American tort system creates "spin-off" lawsuits abroad. See, *e.g.*, Fowler, *supra*, at 380. If the Court sanctions the Ninth Circuit's overly permissive construction of Section 1782, this imbalance will become substantially more pronounced. The Court's decision will be a clarion call to foreign attorneys to use the provision to obtain expansive discovery against U.S. manufacturers. If that occurs, then U.S. companies that sell their products in other countries will uniquely be subject to *both* the expansive liability imposed by foreign substantive law and the burdens of broad, U.S.-style discovery that foreign jurisdictions have elected to avoid.

Already, foreign attorneys are becoming increasingly aware that Section 1782 is "a powerful * * * weapon in the arsenal of the non-U.S. litigant." Franklin B. Velie & Peter J. Gallagher, *Obtaining Information Located In The U.S. For Assistance*, THE WARSAW VOICE ONLINE: POLISH AND CENTRAL EUROPEAN REVIEW (Sept. 18, 2003), at http://-www.warsawvoice.pl/view/3496. See, *e.g.*, Richard H. Kreindler, TRANSNATIONAL LITIGATION: A BASIC PRIMER 154 (1998) (noting that, although Section 1782 "is over thirty years old, it has come into active use only recently"). Treatises on international litigation, foreign law journals, and foreign Internet sites are replete with "practice pointers" regarding the provision. See, *e.g.*, *id.*; Velie & Gallagher, *supra*; W. Cameron Beard, *Useful Tools For Collection Of*

Evidence In The United States In Connection With Norwegian Bankruptcies And Other Norwegian Proceedings: 28 U.S.C. § 1782 And 11 U.S.C. § 304, at http://konkursradet.no/art/?id=60; Steven R. Schoenfeld, *Securing Evidence In The United States Under 28 U.S.C. Section 1782 For Use In Canadian Proceedings* (Sept. 12, 2003), at http://www.torys.com/publi-cations/index.html; Ronald Blum & Peter Ball, *American Courts In Aid Of Foreign Litigation – Discovery In The United States By Litigants In Proceedings Outside The United States*, INT'L CO. COMM. L. REV. 1998, 9(5), 146-149.

The authors of these materials emphasize that, in some U.S. courts, Section 1782 "can be used * * * to obtain U.S.-style discovery for non-U.S. proceedings in which such discovery might not normally be possible or permissible." Kreindler, *supra*, at 174; see also W. Cameron Beard, *supra*, at http://konkursradet.no/art/?id=60#24 ("In more liberal circuits, it is possible to obtain an order directing an individual or corporate entity to produce documents without reference to the strict requirement of specificity (spesifikasjaonskravet) that would control document production under Norwegian law."). These commentators even note the value of "forum-shopping" within the United States to obtain the broadest possible discovery. Kreindler, *supra*, at 154.

If the Ninth Circuit's position becomes the law nationwide, U.S. manufacturers will suffer significant disadvantages when they become defendants in foreign product liability suits. Foreign litigants (and even persons who are not parties to *any* judicial proceeding and hence are not subject to *any* discovery themselves) will be able to obtain broad access to U.S. documents under Section 1782, but will not be subject to equivalent discovery in their home courts. This one-sided employment of "American-style discovery" will "skew foreign litigation" against defendants whose records are located in the United States. *In re Application for an Order Permitting Metallgesellschaft AG to Take Discovery*, 121

F.3d 77, 80 (2d Cir. 1997); see also *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 6 (1st Cir. 1992) (rejecting Ninth Circuit's construction of Section 1782 on the basis that it would "allow a litigant to use United States law to gain an unfair advantage over its adversary in a purely foreign litigation").

The unfairness of employing one-sided discovery in a product liability action is obvious. For example, in France (as in other countries that have adopted the EC product liability directive), a component manufacturer is jointly and severally liable for product defects with the manufacturer of the finished product, unless the component manufacturer can prove "that the defect was caused by the design of the product into which the component was integrated." Fowler, *supra*, at 243. Imagine, then, that a U.S. company manufactures and exports a product containing German components, and that both the U.S. company and the German component manufacturer are sued in France. The component manufacturer would be able to seek expansive discovery in the U.S regarding the design of the finished product, but the U.S company — confined to restrictive French discovery procedures — might well be unable to obtain equivalent information from the German component manufacturer. Such unequal discovery rights would give the German company a distinct and unfair advantage in its efforts to avoid joint and several liability.

Such a lop-sided discovery regime not only would distort individual cases, but would disproportionately encourage the filing of product liability claims against U.S. manufacturers. Under foreign law, as under U.S. law, internal documents that purportedly reflect a company's awareness of risk can be used to establish liability for product defects. See Fowler, *supra*, at 194 (describing English judicial decision concluding that "if the risk is known, or should have been known, then the producer continues to supply and produce at his own risk"). If Section 1782 could be used to obtain such internal

documents from U.S. manufacturers when the foreign tribunal would not afford such discovery against a domestic defendant, then foreign attorneys would have a disproportionate incentive to sue American companies. Having once obtained discovery of an American manufacturer's internal files, the attorneys involved would become "educated" about the evidence and would be able to apply their knowledge of the evidence to the claims of other plaintiffs. Indeed, it is easy to envision the establishment of U.S.-style "document repositories" for use by plaintiffs in foreign group actions. While litigation against American defendants thus would flourish, these attorneys would be less eager to sue non-American companies, from which evidence suggestive of liability would be more difficult to obtain.

Entrepreneurial foreign attorneys already are inventing new ways to employ Section 1782.[3] If this Court affirms the Ninth Circuit's decision and installs a permissive construction of Section 1782 in courts nationwide, this trend undoubtedly will accelerate. If that occurs, then U.S.

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[3] For example, in a case that is now on appeal to the Seventh Circuit, a federal district court in Wisconsin applying Section 1782 has ordered a U.S. company to use its power as indirect shareholder of an Australian company to obtain documents from that company and provide them for use in Australia to a private entity engaged in litigation against the subsidiary in Australia. The applicant approached the court after the Australian court refused to order the Australian company to produce those same documents. *Kestrel Coal Pty. Ltd.* v. *Joy Global Inc.*, No. 03-3604 (7th Cir.). This is precisely the scenario that the First Circuit was seeking to avoid when it decided to require, as a prerequisite to assistance under Section 1782, "a threshold showing that the information would be discoverable in the foreign jurisdiction if located there." *In re Application of Asta Medica, S.A.*, 981 F.2d at 6 (predicting that a foreign litigant denied discovery abroad would attempt to "side-step that result by racing here and obtaining the information under Section 1782").

manufacturers that sell their products abroad will operate under the rule of foreign product liability law, without the benefit of the discovery procedures that foreign courts and legislatures have decided are appropriately used in civil actions under those laws. As we discuss below, Congress plainly did not intend that result.

III. THE NINTH CIRCUIT'S CONSTRUCTION OF SECTION 1782 FLOUTS THE INTENT OF CONGRESS TO PROMOTE EFFICIENT COOPERATION IN INTERNATIONAL LITIGATION

Both the First and the Eleventh Circuits require private applicants seeking information under Section 1782 to demonstrate that "the information sought in the United States would be available under foreign law." *Asta Medica,* 981 F.2d at 2; see *In re Lo Ka Chun*, 858 F.2d 1564, 1566 (11th Cir. 1988); *Request for Assistance From Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988). The Ninth Circuit erred in rejecting that sensible rule. Indeed, the Ninth Circuit compounded the problem by granting discovery rights to a private non-litigant not subject to *any* reciprocal discovery in a foreign proceeding.

When Congress amended Section 1782 in 1964, its purpose was to facilitate foreign litigation, and to encourage reciprocal action by other countries, by making the location of information irrelevant to its availability for use in foreign proceedings. Congress clearly did not intend U.S. courts to order the production of documents that would not have been discoverable in the foreign proceeding if they had been located in the foreign jurisdiction. When it enacted the package of legislation that included the relevant amendments to Section 1782, Congress stated that the legislation would "constitute a major step in bringing the United States to the forefront of nations *adjusting their procedures to those of sister nations* and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in

litigation with international aspects." S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.A.A.N. 3782, 3783 ("Senate Report") (emphasis added); see also *id.* (expressing desire to "invite foreign countries similarly to adjust their procedures."). Specifically with respect to Section 1782, the Senate Report stated that the amendments were intended to "clarify[] and liberalize[] existing U.S, procedures for assisting foreign and international tribunals and litigants in obtaining oral and documentary evidence in the United States and *adjust[] those procedures to the requirements of foreign practice*." *Id.* at 3788 (emphasis added).

The text of the provision, which allows the court to order testimony or production of documents "for use in a proceeding in a foreign or international tribunal" (28 U.S.C. § 1782(a)), similarly conveys Congress's intent that U.S. courts attempt to satisfy *the foreign tribunal's* discovery requirements. In contrast, nothing in the language or legislative history of Section 1782 suggests that Congress wanted federal courts to *ignore* the contours of foreign discovery practice when considering an application under Section 1782.

The Ninth Circuit determined that "allowance of liberal discovery" was "consistent with the twin aims of Section 1782: providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts." Pet. App. 8a. But there is nothing "efficient" about forcing defendants to produce more information than could have been obtained in the foreign proceeding, simply because the documents in question happen to be located here. To the contrary, from the perspective of the foreign tribunal, that approach results in *excessive* and often one-sided discovery. Moreover, it would be extremely *inefficient* if the liberality of our discovery rules encouraged foreign litigants to come here to obtain informa-

tion *that is also located abroad*, simply because it is easier to convince our courts to order that it be produced.[4]

Nor is the Ninth Circuit's ruling supported by the goal of encouraging reciprocal action by other countries. Congress hoped that foreign countries would provide U.S. litigants seeking information abroad with the same discovery rights (not more, and not less) that they would have if they were seeking information in the United States under U.S. law. That goal would be achieved if foreign courts, like the First and Eleventh Circuits, granted discovery to U.S. litigants who could establish that they would be entitled to the information if it were located here.

The Ninth Circuit also asserted, without elaboration, that "good and sound policy reasons" support its decision. Pet. App. 8a. But considerations of policy weigh heavily *against* affording foreign litigants expansive rights to obtain discovery from U.S. companies when they would not be able to exercise such rights against their compatriots at home. First, "foreign countries may be offended by the use of United States procedure to circumvent their own procedures and laws." *Asta Medica*, 981 F.2d at 6. As discussed above, other countries have chosen not to adopt American-style discovery procedures, and many nations are affirmatively hostile to U.S. practices. "Few actions could more significantly impede the development of international cooperation among courts than if the courts of the United States operated to give liti-

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[4] Indeed, as explained in footnote 3, *supra*, a federal district court recently ordered a U.S. company to obtain from its Australian indirect subsidiary documents *located in Australia*, so that the documents could be produced in the U.S. to an *Australian* plaintiff that wanted to use the documents in an *Australian* proceeding. Nothing could be more inefficient than forcing American companies to serve as conduits for foreign documents that must circle the globe so that they can be used in litigation in the foreign jurisdiction where they originated.

gants in foreign cases processes of law to which they were not entitled in the appropriate foreign tribunals." *In re Court of the Comm'r of Patents for the Republic of South Africa*, 88 F.R.D. 75, 77 (E.D. Pa. 1980).

Second, as discussed above, "foreign tribunals and legislatures * * * have carefully chosen the procedures and laws best suited for their concepts of litigation." *Asta Medica*, 981 F.2d at 6. The use of Section 1782 to produce documents not available under local discovery rules would distort the foreign proceedings. Furthermore, allowing expansive discovery in the U.S. may make the foreign proceedings more expensive, protracted, and burdensome than is necessary to resolve the case appropriately under foreign law.

Finally, as discussed above in Section II, allowing non-mutual discovery would prejudice U.S. companies engaged in foreign litigation and create special incentives to sue them in the first place. In pursuing its goal of international cooperation in litigation, Congress surely did not intend to put a finger on the scale to weigh *against* U.S. citizens litigating abroad. See *Asta Medica*, 981 F.2d at 5-6 (Congress did not mean "to place United States litigants in a more detrimental position than their opponents when litigating abroad"). Nor did Congress intend to create the competitive disadvantages to U.S. companies that would result if Section 1782 made them *more* vulnerable to foreign litigation than their foreign counterparts.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

HUGH F. YOUNG, JR.
Product Liability Advisory Council, Inc.
Suite 510
1850 Centennial Park Drive
Reston, VA 20191
(703) 264-5300

KENNETH S. GELLER
Counsel of Record
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

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